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July 24, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

VIA HAND DELIVERY

Re: Notification of Permitted *Ex Parte* Communications—Closed Captioning and Video Description of Video Programming Notice of Proposed Rulemaking MM Docket No. 95-176

Dear Mr. Caton:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, Cole, Raywid & Braverman, on behalf of Outdoor Life Network, Speedvision Network, The Golf Channel, BET On Jazz and America's Health Network, hereby submits two copies of a permitted written *ex parte* presentation submitted today to the following individuals in the captioned proceeding: William H. Johnson, Meredith J. Jones, Marsha J. MacBride, Gretchen Rubin, Suzanne K. Toller and Anita L. Wallgren.

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If you need any additional information, please contact the undersigned.

Respectfully submitted,

James W. Tomlinson

Burt A. Braverman
James W. Tomlinson

cc: William H. Johnson
Meredith J. Jones
Marsha J. MacBride
Gretchen Rubin
Suzanne K. Toller
Anita L. Wallgren

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FEDERAL COMMUNICATIONS COMMISSION
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EX PARTE MEMORANDUM

VIA HAND DELIVERY

To: William H. Johnson
Meredith J. Jones
Marsha J. MacBride
Gretchen Rubin
Suzanne K. Toller
Anita L. Wallgren

From: Burt A. Braverman
James W. Tomlinson

Date: July 24, 1997

Re: **Closed Captioning and Video Description of Video Programming Notice of Proposed Rulemaking MM Docket No. 95-176**

This memorandum presents the views of Outdoor Life Network, Speedvision Network, The Golf Channel, BET On Jazz and America's Health Network (collectively, "Networks"), regarding a possible revenue-based exemption from mandatory closed captioning requirements and the captioning of library programming. Pursuant to Section 1.1206(b)(1) of the Commission's Rules, two copies of this document shall be submitted to the Secretary for inclusion in the public record.

I. Revenue-Based Exemption/Expense Limit

In an *ex parte* memorandum of July 16, the Networks presented their general views regarding a revenue-based exemption and captioning expense limit. Specifically, the Networks stated that while such a rule represents a positive step toward providing start-up networks and others with desperately needed relief, it is problematic because of the vast differences that exist among the various kinds of video programming distributors. The Networks have consistently urged the Commission to consider the various classes of video programming distributors separately and to develop targeted and administratively workable exemptions for each of those industry segments where they are necessary and where bright-line distinctions can be made using objective data. In the case of nationally-distributed basic cable networks, the appropriate standard is 20 million subscribers.

Nonetheless, the Networks understand that the Commission is seriously considering an exemption for certain classes of video programming distributors, including an exemption for those distributors with less than a specified amount of annual revenue (*e.g.*, $2 million) and the imposition of a limit on the annual expense that all other distributors would be required to incur, expressed as a percentage of annual revenue (*e.g.*, 1 percent). Unfortunately, a rule whereby each cable network must dedicate a flat percentage of revenues to captioning will be highly regressive in impact; *i.e.*, it will be much more harmful to a low-penetrated network operating at a loss than to a larger, profitable, established network.

As the Networks explained in their Comments, any funds that they are required to expend on captioning will displace other priority expenditures—funds currently allocated to programming, production or marketing—thus further weakening their ability to obtain carriage and deliver quality programming to the public. On the other hand, an established network might suffer only a modest reduction in profits and, given their bargaining power with cable operators, may even be able to pass along their costs to consumers through increased licensing fees. In short, the impact of such a diversion of funds on low-penetrated networks, which are incurring substantial operational losses and have essentially no bargaining power with cable operators, will be much more severe than upon larger networks.

Given these realities, should the Commission decide to pursue such an exemption/expense limit, the Networks recommend that the Commission adopt a *progressive* schedule of revenue percentages that a network would be required to dedicate to captioning; *i.e.*, a schedule whereby the percentage is based on the network's revenues and ability to afford captioning.

Specifically, the Networks suggest a formula under which a national basic cable network would be required to dedicate its revenues[1] to captioning according to the following schedule:

- revenues below $2 million — 0 percent;
- revenues of between $2 million and $25 million — 0.15 percent;
- revenues of between $25 million and $50 million — 0.30 percent;
- revenues of between $50 million and $75 million — 0.45 percent; and
- revenues of between $75 million and $100 million — 0.60 percent.

When considered in comparison with other priority expenditures, the proposed percentages of annual revenue are very reasonable. For example, video programming networks pay music licensing fees, in the amount of only approximately 0.6 percent of revenues, to ASCAP and BMI in the aggregate for the right to perform the musical recordings contained in their programming—a service that adds tremendous value to the program content for the vast majority of viewers. The Networks suggest that this is the upper limit of what the Commission should establish as the percentage of revenues that cable networks must set aside for closed captioning.

Moreover, the proposed revenue thresholds are appropriate for national basic cable networks in light of the enormous investments in programming, marketing and distribution that are required to launch and operate such a network. For example, the Networks estimate that they will each require at least $50 million in annual revenues before they can begin to operate on a cash-flow positive basis, and it is only at the $75 million level where they each will begin to recoup their start-up losses and become established and profitable. Of course, the Networks will have every incentive to use funds dedicated to captioning efficiently and in a manner that will maximize their level of captioned programming. Therefore, the tendency will be to caption programming that is viewed most heavily and/or to caption programming that will be repeated most frequently. As a result, these expenditures can be expected to yield substantial benefits for the hearing impaired.

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[1] The Commission should define "revenues" as payments received from the sale of advertising time and licensing fees paid by MVPDs, less direct payments made by the network to MVPDs for carriage and for marketing and launch support. For example, a network may earn $10 million in revenue from licensing fees paid by MVPDs, but make $4 million in direct payments to these MVPDs for marketing and launch support. In such a case, the relevant annual revenue figure is $6 million. Moreover, while sales of advertising time and licensing fees are the traditional sources of revenue for basic cable networks, some networks, such as America's Health Network, generate revenue through other means, *e.g,* merchandise sales. Given that revenues generated in such a manner are *directly* offset by the network's cost to purchase the merchandise, it would be inappropriate to count such revenues for purposes of the proposed formula, unless the cost of goods sold and their distribution is first subtracted from the revenue figure.

A schedule with different revenue thresholds or percentages may be appropriate for other types of video programming distributors (*e.g.*, LPTV stations or broadcast TV stations). While the Networks do not presume to suggest what these levels or percentages should be for other industry segments, for national basic cable networks, this proposed formula will establish a requirement for a reasonable amount of captioned programming—even for those networks with very modest revenues. Most importantly, though, the proposed schedule establishes this requirement in a manner that does not disproportionately harm start-up networks.

II. Library Programming

The Networks again urge the Commission to consider that any mandate for the captioning of library programming be reasonable, realistic and reflect the economic and competitive realities of the cable programming industry. Because of the enormous cost of producing and acquiring new and original programming, the Networks—like most cable programming networks, and especially start-up cable networks—rely heavily upon diverse library programming (*e.g.*, 70 percent for Outdoor Life and over 50 percent for Speedvision).

Given the relaxed statutory mandate for library programming, a requirement that a network caption 75 percent of all library programming over a period of ten years is inappropriate and will have a disastrous financial impact on the cable programming industry. Moreover, such a requirement will not necessarily lead to the captioning of more library programming, but rather will force networks to either increase the amount of repeats of original programming they distribute or to forego much distinctive library material—at direct cost to the *diversity* of programming available to all subscribers. Such a result is clearly not what Congress intended.

The Commission need not adopt *any* mandatory schedule for the captioning of library programming, and, in fact, should adopt only voluntary guidelines with specific goals and time tables, as contemplated by Congress. However, if it chooses to impose such a requirement, the Commission should, at most, impose a 50 percent captioning requirement over a 15-year timeframe, as proposed by the Motion Picture Association of America.

* * *

Should you wish to discuss these issues in more detail, please feel free to contact us at your convenience.